

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TX
NOV-6 2003
CLERK OF COURT

MICROSOFT CORPORATION, a Washington Corporation,

Plaintiff,

v.

C I HOST, INC., a Texas Corporation,

Defendant.

CASE NO.

4-03 CV 1326-A

ORIGINAL COMPLAINT

I. Introduction

1. This is an action by Microsoft Corporation ("Microsoft") to recover damages from C I Host, Inc. ("C I Host") for copyright infringement and breach of contract. Microsoft is also bringing this action to obtain an accounting, impose a constructive trust, and enjoin C I Host's future copyright infringement.

2. Microsoft develops, markets, distributes, and licenses computer software. C I Host is an Internet-based "web hosting" company. In very general terms, a "web hosting" company is one that provides its customers with electronic access to computer hardware and software so that the customer does not have to acquire its own hardware and software. As the name implies, C I Host acts as a "host" for its customers' Internet presence and provides the hardware and software necessary for that presence. In that capacity, C I Host has rented, leased, lent and/or hosted Microsoft's software to C I Host's customers. But C I Host has not acquired

the Microsoft licenses necessary to do that. Accordingly, neither C I Host nor its customers have compensated Microsoft for C I Host's customers' usage of Microsoft software.

3. C I Host could have engaged in this conduct lawfully, if it had first entered a Services Provider License Agreement ("SPLA") with Microsoft. Under a SPLA, Microsoft would have granted C I Host the right to "host" its customers using Microsoft software and to charge those customers for that usage. In turn, C I Host would have agreed to share a portion of those charges with Microsoft. C I Host has chosen, however, to deprive Microsoft of that revenue and to keep for itself all of the proceeds it has received from those customers. That deprivation has resulted in C I Host's infringement of Microsoft's copyrights and a breach of the license agreements under which C I Host acquired the software from Microsoft.¹

4. Therefore, Microsoft seeks (1) copyright infringement and breach of contract damages from C I Host, (2) an accounting from C I Host, (3) the imposition of a constructive trust upon C I Host's illegal profits, and (4) the entry of a permanent injunction against C I Host, forbidding C I Host from engaging in this illegal conduct in the future.

II. The Parties

1. Microsoft is a Washington corporation with its principal place of business in Redmond, Washington. Microsoft develops, markets, distributes, and licenses computer software.

2. C I Host, Inc. is a Texas corporation with its principal place of business in Bedford, Texas. C I Host also does business on the Internet. C I Host is a "web hosting"

¹ At this time, Microsoft is not certain that C I Host has acquired the proper licenses to legally use even the Microsoft software that it currently possesses. Microsoft has no doubt, however, that C I Host is not licensed to rent, lease, lend, or host Microsoft software to its customers. That would require a Services Provider License Agreement ("SPLA"), which C I Host has not entered into with Microsoft.

company that provides hardware, software, and technical support to companies (and individuals) who chose not to acquire those things for themselves. By doing so, C I Host is engaged in various businesses, including, among other things, the business of renting, leasing, lending, and/or hosting certain Microsoft software through its Internet web site, www.cihost.com. C I Host may be served through its Registered Agent, Carole A. Faulkner, 1851 Central Drive, Suite 110, Bedford, Texas 76021.

III. Jurisdiction and Venue

1. This Court has subject matter jurisdiction over Microsoft's claims for copyright infringement and related claims pursuant to 17 U.S.C. § 501, 15 U.S.C. § 1121, 28 U.S.C. § 1338(a) and (b), 28 U.S.C. § 1331, and 28 U.S.C. § 1332.

2. This Court also has supplemental jurisdiction over Microsoft's claims arising under the laws of Texas pursuant to 28 U.S.C. § 1367(a) because these claims are so related to Microsoft's claims under federal law that they form part of the same case or controversy and derive from a common nucleus of operative fact.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and § 1400(a) because (a) the acts of infringement and other wrongful conduct occurred in the Northern District of Texas and (b) C I Host may be found in the Northern District of Texas.

IV. Facts Common to All Claims

A. Microsoft Owns Federally Registered Copyrights That Cover a Number of Popular Computer Software Programs.

1. Microsoft develops, advertises, markets, distributes, and licenses a number of computer software programs. Microsoft licenses that software for limited, specified uses by its

customers. Those permissible uses vary according to the terms of the particular license under which the customer has acquired the right to use the particular software.

2. Microsoft Windows 2000 Server: One of Microsoft's popular software programs is "Microsoft Windows 2000 Server." Microsoft Windows 2000 Server is an operating system for computer servers that performs a number of computer-related operations, including, but not limited to, running software applications connecting to Internet and intranet sites, allocating computer memory, scheduling the execution of applications software, and managing the flow of data among the various components of a computer server system. Microsoft holds a valid copyright in Microsoft Windows 2000 Server that has been duly and properly registered with the United States Copyright Office. A true and correct copy of the Microsoft Windows 2000 Server Copyright Registration Certificate, which bears Registration No TX 5-036-268, is attached hereto as Exhibit "A" and is incorporated by reference.

3. Microsoft Windows Server 2003: Another of Microsoft's popular software programs is "Microsoft Windows Server 2003." Microsoft Windows Server 2003 is an operating system for computer server systems that performs a number of computer-related operations, including, but not limited to running software applications, connecting to Internet and intranet sites, and accessing files, printers, and network resources. Microsoft has submitted timely requests to the United States Copyright Office for a Certificate of Registration of its Copyright in that software. As yet, Microsoft has not received that Registration Certificate.

B. C I Host Willfully Infringed Microsoft's Registered Copyrights and Breached its Contract(s) with Microsoft by Advertising, Marketing, Renting, Leasing, Lending, and/or Hosting Microsoft Software, Even After Microsoft Informed C I Host of its Illegal Conduct.

1. C I Host is engaged in the business of "web hosting," including the advertising, marketing, renting, leasing, lending, and/or hosting of computer software to other businesses or individuals. Included in the software that C I Host advertises, markets, rents, leases, lends, and/or hosts are programs owned by Microsoft and covered by Microsoft's registered copyrights.

2. To the extent C I Host has valid licenses for the Microsoft Windows 2000 Server and the Microsoft Windows Server 2003 software that it possesses, those licenses and the permissible uses of that software are governed by the Microsoft Open License Agreement (the "Agreement"), a copy of which is attached hereto as Exhibit B. That Agreement operates as a contract under Texas law and governs the uses that Microsoft has authorized C I Host to make of that software. Moreover, that Agreement contains certain restrictions, which forbid certain uses of the Microsoft software. Those restrictions are contained in Paragraph 7 of the Agreement. Among other things, those restrictions provide that C I Host, "may not: ... rent, lease, lend or host products, except where [Microsoft and C I Host] agree by separate agreement." Microsoft and C I Host have not entered into any such "separate agreement" or any other licensing contract that would have changed the terms of the Agreement.

3. By letter dated September 28, 2001, Microsoft notified C I Host that Microsoft had received reports that C I Host was engaging in infringing activity by inappropriately using commercial licenses for application hosting purposes and suggesting that C I Host may have been engaging in unlicensed software deployment of Microsoft products inside its own operation and

as a service provider to third parties. Microsoft asked C I Host to conduct its own internal audit of its activity and to discuss any applicable licensing compliance issues with Microsoft.

4. By email dated November 30, 2001, Microsoft raised these issues again with C I Host and again asked C I Host to conduct its own internal audit of its activity and to discuss any applicable licensing compliance issues with Microsoft.

5. By letter dated December 13, 2001, C I Host's attorney contacted Microsoft, denied that C I Host had engaged in any wrongdoing, and threatened to sue Microsoft for defamation if Microsoft made its allegations known to any third parties.

6. Since that date, C I Host has continued its Internet-based business, which advertises, markets, rents, leases, lends, and/or hosts Microsoft software to C I Host's customers.

7. By doing one or more of those things, C I Host has committed and is continuing to commit acts of copyright infringement and breach of contract against Microsoft. Further, C I Host's acts have been and continue to be willful, deliberate, and committed with prior notice and knowledge of Microsoft's copyrights. At a minimum, C I Host has been and continues to be willfully blind and has acted and continues to act in reckless disregard of Microsoft's registered copyrights.

8. By its conduct, including its advertising activities and unauthorized use of Microsoft's marks to describe the items that it has been making available for rent, lease, loan, and/or host, C I Host has misappropriated Microsoft's advertising ideas and style of doing business and has infringed Microsoft's copyrights.

9. Microsoft has sustained injuries and damages that have been directly and proximately caused by C I Host's wrongful misappropriation of Microsoft's advertising ideas and

style of doing business and infringement of Microsoft's copyrights, titles, and slogans. Moreover, Microsoft has sustained injuries and damages that have been directly and proximately caused by C I Host's violations of the Agreement.

V. Causes of Action

A. Copyright Infringement

1. Microsoft re-alleges and incorporates by this reference each and every allegation set forth in Section IV of this Original Petition.

2. Microsoft is the sole owner of Microsoft Windows 2000 Server, Microsoft Windows Server 2003, and all corresponding copyrights and Certificates of Registration.

3. C I Host has infringed the copyrights in Microsoft's software, including but not limited Microsoft Windows 2000 Server and Microsoft Windows Server 2003 by advertising, marketing, renting, leasing, lending, and/or hosting Microsoft's software in the United States of America without approval or authorization from Microsoft.

4. C I Host's conduct has been willful within the meaning of the Copyright Act. At a minimum, C I Host has acted with willful blindness to and in reckless disregard of Microsoft's registered copyrights.

5. As a result of its wrongful conduct, C I Host is liable to Microsoft for copyright infringement. 17 U.S.C. § 501. Microsoft has suffered, and will continue to suffer, substantial losses, including but not limited to damage to its business reputation and goodwill. Microsoft is entitled to recover damages, which include its own losses and any and all profits that C I Host has made as a result of its wrongful conduct. 17 U.S.C. § 504.

6. Microsoft is also entitled to injunctive relief pursuant to 17 U.S.C. § 502 and to an order impounding any and all Microsoft software that C I Host is advertising, marketing, renting, leasing, lending, and/or hosting pursuant to 17 U.S.C. § 503. Microsoft has no adequate remedy at law for C I Host's wrongful conduct because, among other things, (a) Microsoft's copyrights are unique and valuable property that have no readily determinable market value, (b) C I Host's infringement harms Microsoft's business reputation and goodwill such that Microsoft could not be made whole by any monetary award, and (c) C I Host's wrongful conduct, and the resulting damage to Microsoft, is continuing. Microsoft is also entitled to recover its attorneys' fees and costs of suit. 17 U.S.C. § 505.

B. Breach of Contract

1. Microsoft re-alleges and incorporates by this reference each and every allegation set forth in Section IV of this Original Complaint.

2. Because C I Host has been engaging and is continuing to engage in this conduct, it has breached and is continuing to breach the specific terms of the Microsoft Open License Agreement, which has been and continues to be its contract with Microsoft.

3. C I Host's conduct as alleged above has damaged and will continue to damage Microsoft, Microsoft's goodwill, and Microsoft's reputation. Moreover, that conduct has resulted in losses to Microsoft and an illicit gain of profit to C I Host in an amount that is unknown at the present time.

C. Imposition Of A Constructive Trust Upon Illegal Profits

1. Microsoft re-alleges and incorporates by this reference each and every allegation set forth in Section IV of this Original Complaint.

2. C I Host's conduct constitutes deceptive, fraudulent, and wrongful conduct in the nature of passing off the unauthorized renting, leasing, lending, and/or hosting of Microsoft software as authorized renting, leasing, lending, and/or hosting of Microsoft software.

3. By virtue of C I Host's wrongful conduct, C I Host has illegally received money and profits that rightfully belong to Microsoft.

4. Upon information and belief, C I Host holds the illegally received money and profits in the form of bank accounts, real property, or personal property that can be located and traced.

5. C I Host holds the money and profits they have illegally received as constructive trustees for the benefit of Microsoft.

D. Accounting

1. Microsoft re-alleges and incorporates by this reference each and every allegation set forth in Section IV of this Original Complaint.

2. Microsoft is entitled, pursuant to 17 U.S.C. § 504 and 15 U.S.C. § 1117, to recover any and all profits of C I Host that are attributable to their acts of infringement.

3. Microsoft is entitled, pursuant to 17 U.S.C. § 504 and 15 U.S.C. § 1117, to actual damages or statutory damages sustained by virtue of C I Host's acts of infringement.

4. The amount of money due from C I Host to Microsoft is unknown to Microsoft and cannot be ascertained without a detailed accounting by C I Host of the precise number of units of infringing material offered for distribution and distributed by C I Host.

VI. Prayer for Relief

Microsoft respectfully requests judgment as follows:

1. That the Court enter a judgment against C I Host, finding that C I Host has:
 - (a) willfully infringed Microsoft's rights in the following federally registered copyrights, in violation of 17 U.S.C. § 501:
 - (1) TX 5-036-268 (Microsoft Windows 2000 Server);
 - (2) *Registration Number Pending for* Microsoft Windows Server 2003; and
 - (b) otherwise injured the business reputation and business of Microsoft by the acts and conduct set forth in this Complaint.
2. That the Court issue an injunction against C I Host, and that C I Host, its officers, agents, representatives, servants, employees, attorneys, successors and assigns, and all others in active concert or participation with C I Host, be enjoined and restrained from:
 - (a) renting, leasing, lending, and/or hosting other infringing use or infringing distribution of the software and/or materials now or hereafter protected by the following copyright Certificates Registration Nos.:
 - (1) TX 5-036-268 (Microsoft Windows 2000 Server); and
 - (2) *Registration Number Pending for* Microsoft Windows Server 2003.
 - (b) renting, leasing, lending, and/or hosting any software, component, or thing bearing any simulation, reproduction, counterfeit, copy, or colorable imitation of any of Microsoft's copyrights, including, but not limited to, those listed in Sections (2)(a)(1) and (2)(a)(2) above;
 - (c) using any designation of origin or description that can or is likely to lead anyone to believe that any software has been rented, leased, lent, hosted, distributed, offered for distribution, circulation, sold, offered for sale, imported, advertised, promoted, displayed, licensed, sponsored, approved, or authorized by or for Microsoft, when such is not true in fact;

- (d) using reproductions, counterfeits, copies or colorable imitations of Microsoft's copyrighted software and other materials in the distribution, offering for distribution, circulating, sale, offering for sale, advertising, importing, promoting, or displaying of any merchandise not authorized or licensed by Microsoft;
- (e) using the names, logos, or other variations thereof of any of Microsoft's copyrighted software in any of C I Host's trade or corporate names;
- (f) engaging in any other activity constituting an infringement of any of Microsoft's copyrights, or of Microsoft's rights in, or right to use or to exploit these copyrights; and
- (g) assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (a) through (f) above.

3. That the Court enter an order declaring that C I Host hold in trust, as constructive trustees for the benefit of Microsoft, C I Host's illegal profits obtained from its improper renting, leasing, lending, or hosting of Microsoft's software;

4. That the Court enter an order requiring C I Host to provide Microsoft a full and complete accounting of all profits obtained from C I Host's improper renting, leasing, lending, or hosting of Microsoft's software;

5. That the Court order C I Host to pay Microsoft's general and actual damages as follows:

- (a) Microsoft's damages and C I Host's profits pursuant to 17 U.S.C. § 504(b) or, alternatively, enhanced statutory damages pursuant to 17 U.S.C. § 504(c), and 17 U.S.C. § 504(c)(2), for C I Host's willful infringement of Microsoft's copyrights; and
- (b) Microsoft's damages and C I Host's profits pursuant to Texas common law.

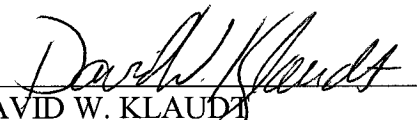
6. That the Court order C I Host to pay to Microsoft both the costs of this action and the reasonable attorneys' fees incurred by it in prosecuting this action; and

7. That the Court grant to Microsoft such other and additional relief as is just and proper.

Respectfully submitted,

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